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No. 88-1954

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

PATRICIA ANN STACHE,
Petitioner,
v.
INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN, AFL-CIO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an international union that was not named in plaintiff's EEOC charges may be sued under Title VII of the 1964 Civil Rights Act for failing to remedy discriminatory conduct by a separate autonomous local union affiliated with the international union, where:

(1) the international union was not involved in any of the local's discriminatory conduct;

(2) no policies established by the international union were at issue;

(3) the facts on which the international's liability is based were not mentioned or alluded to in the EEOC charges; and

(4) the international union was never apprised prior to the filing of the lawsuit that its own liability was at issue.

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BRIEF IN OPPOSITION

OPINIONS BELOW

Petitioner's statement of the opinions below incorrectly asserts that one of the three judges on the Ninth Circuit panel hearing the case favored a rehearing en banc. (Pet. 1.) In fact, none of those judges supported en banc review. The two circuit judges on the panel voted against the suggestion of an en banc hearing, and Judge King (who, as a district judge, could not vote on the matter) "so recommended"—that is, recommended against a rehearing en banc. (Pet. App. B-2.)

STATEMENT OF THE CASE

Petitioner claims that respondent International Union of Bricklayers and Allied Craftsmen (the "International") should be liable under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.*, for failing to remedy discriminatory acts by one of the 570 autonomous local unions affiliated with the International against one of its 103,000 individual members, despite the undisputed fact that the International had no involvement whatever in local's discriminatory conduct and was not named, or alluded to, in four separate discrimination charges that petitioner filed with the EEOC or its cooperating state agencies.

1. After trial, petitioner was found to have been discriminated against on the basis of sex by Bricklayers and Tile Setters Local Union 20 of California ("Local 20" or "the Local") and by a joint union-management apprenticeship committee (the "JAC") that was organized and run in part by Local 20. It is undisputed that the International and Local 20 are separate and distinct legal entities,[1] that no officers or employees of Local 20 are or have been officers or employees of the International, and that the International had no involvement in any of the Local's day to day activities, such as negotiation and enforcement of the Local's collective bargaining agreements, election of local officers and hiring of its business agents, or management of the Local's internal affairs. It is also undisputed that the International played no part in the

[1] The courts have long held "that a local union is a legal entity apart from its international and that it is not a mere branch or arm of the latter." *International Brotherhood of Electrical Workers*, 121 NLRB 143, 146 & n.3 (1958) (citing numerous cases). *See Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212 (1979); *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922). The Bricklayers International Constitution (Trial Exhibit 110) specifically guarantees local union autonomy and further provides that none of the International's affiliated locals has authority to act on behalf of the International without express authorization.

operation or management of the JAC. (5 RT 96-97; 12 RT 133-35.)

After trial the International Union was also held liable; that liability, however, was based on facts separate and distinct from the acts of intimidation and harassment set forth on page 4 of the petition, upon which the liability of Local 20 and the JAC was based. As petitioner states, "[t]he District Court found that the International discriminated against Stache because it refused to make available to her its usual mechanisms for resolving grievances by members against other members or against affiliated locals for violations of the International's constitution." (Pet. 4-5.) The evidence underlying this finding related to four occasions in which the International allegedly "learned or should have learned" of discrimination against petitioner by the Local. (Pet. App. C-17, 21.)

(a) The first such occasion involved a telephone conversation between one of Local 20's assistant business agents and an International field representative, during which the local official mentioned, in the most general terms, that he had been asked to attend an EEOC conciliation conference concerning a discrimination charge. There was no reference during the conversation to the nature of the charge, the fact that it concerned an allegation of sex discrimination, or the name of the individual claiming discrimination.

(b) Two of the other instances in which the International was informed of alleged discrimination by the Local were the result of a voluntary agreement that the International had entered into with the EEOC. Under that agreement, the International was regularly sent a computer list of EEOC charges pending against bricklayer locals throughout the country as a means of aiding in its voluntary efforts to conciliate discrimination disputes between its locals and individual members.[2] On

[2] In 1980 the EEOC adopted a procedure whereby international unions could voluntarily receive notification of EEOC charges

both of these occasions, following its receipt of the printouts listing petitioner's EEOC charge against Local 20, the International promptly sent a letter to the Local inquiring about the charges. In both instances, the International received replies from Local 20 that reasonably led the International to believe that no action on its part to aid in conciliation was warranted.[3]

(c) At the trial, the principal factual issue concerning the International involved its failure to institute disciplinary proceedings against Local 20 in response to a letter petitioner claimed to have sent to the International in 1982 complaining about the Local's failure to refer her to jobs. The purported letter, however, was, according to petitioner's evidence, incorrectly addressed, lacking a street name, number and zip code, and petitioner was unable at trial to present any evidence that the letter was

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pending against their affiliated locals. That procedure is set forth in Section 3 of the EEOC's Compliance Manual, promulgated pursuant to 42 U.S.C. § 2000e-12(a). Section 3.8(a) of the Manual provides:

> National or International unions participating in the processing of charges . . . will not be named as respondents solely for involving themselves, after the fact, in a charge or complaint against affiliated local unions in order to determine the underlying facts or to seek a voluntary resolution of the charge or complaint.

The Bricklayers International Union has voluntarily participated in this program since its inception. In furtherance of its voluntary efforts to aid in the resolution of complaints, the International tracks all known complaints of discrimination resulting from the EEOC printouts.

[3] The Local responded to the International's inquiry regarding the first EEOC charge by stating that the "charges have been dropped at this time" (Exhibit 113), a statement that the Local believed to be true, since the EEOC did in fact close the file in the case. The Local's response to the second inquiry from the International accurately stated that petitioner was about to file a lawsuit. (9 RT 74.)

in fact mailed. (4 RT 131-33.)[4] The International denied ever having received such a letter.

In a portion of its ruling not challenged in the petition, the Ninth Circuit held that the district court improperly applied the rules of evidence in admitting the letter into evidence, and that, without the letter, there was no triggering mechanism by which the International was compelled to act. (Pet. App. A-8 and n.2.)

On the basis only of these four sparse and problematic contacts, and with no evidence whatever linking the International's own actions or inactions to petitioner's sex, the district court held that the International discriminated against the petitioner on the basis of sex in the manner in which the International handled the information it received concerning her dispute with the Local. (Pet. App. C-17, 21.)[5]

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[4] The petition falsely states that "[t]he International admitted at trial that the reason that it withheld its grievance procedures from Stache . . . was because the International knew that Stache had filed a sex-discrimination charge with the EEOC." (Pet. 5) (emphasis deleted). To the contrary, the International maintained consistently and emphatically that the reason it did not respond to petitioner's letter complaining about the Local was that no such letter was ever received. The testimony of the International Vice President quoted in the petition concerned the International's general procedures used in conjunction with its voluntary receipt of EEOC printouts, not its treatment of complaints directly *from members*. (5 RT 180-81.)

[5] In particular, the district court held that the International "discriminated against Stache on the basis of her sex because it knew or should have known of the discrimination against Stache by Local 20 and, despite the power to do so, failed to act." (Pet. App. C-17, 21.) The district court's conclusion that international unions have an *automatic* affirmative duty under Title VII to prevent violations of that statute by their affiliated locals has no support in circuit court case law and is contrary to the court of appeals decisions directly addressing the question. *E.g., Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1427-30 (D.C. Cir. 1988), *cert. denied*, 104 L.Ed.2d 1018 (1989);

2. None of the factual matters pertaining to the International's alleged failure to remedy the discriminatory actions by Local 20 were stated or suggested in any of the four discrimination charges that preceded the lawsuit, or during the extensive EEOC conciliation proceedings that were conducted in response to those charges. Because the petition misstates the facts regarding the filing and processing of the EEOC charges, we review them below.

(a) Petitioner filed the first of the EEOC charges on April 17, 1981. (4 RT 180.) The charge was prepared by an EEOC official who met personally with petitioner (4 RT 180-81), and included a two-page single-spaced explanation of how the Local had discriminated against petitioner in referrals, wages, denial of a union card and apprenticeship training. The charge named only Local 20 as a respondent, and contained no factual information suggesting that the International was involved in acts giving rise to the EEOC claim.[6]

After the charge was served on the Local, an EEOC Equal Opportunity Specialist held a fact-finding and conciliation conference pursuant to 42 U.S.C. § 2000e-5(b), attended by the petitioner and the Local's business manager. At the conference the EEOC official thoroughly reviewed the charge with the Local's business manager,

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Sinyard v. Foote & Davies Div. of McCall Corp., 577 F.2d 943, 944, 947 (5th Cir. 1978). Because the court of appeals in this case concluded that the International was not properly named in the EEOC charges, that court did not reach the issue of whether the district court's decision was correct on the merits of the affirmative duty question. (Pet. App. A-8 at n.1.)

[6] It is undisputed that at the time the first charge was filed against the Local, the International has *no* notice of any kind concerning possible discrimination by the Local against the petitioner. It is hard to see how information first acquired after a charge was filed could be the linchpin of a finding that the International, *before* the charge was filed, had discriminated against the petitioner.

obtained additional information and explained in detail Local 20's Title VII responsibilities. After the conference, the EEOC official held follow-up telephone conversations with both parties that resulted in Local 20's taking various corrective measures. (4 RT 41-46.) The International was not invited to, and did not in fact, participate in any of these proceedings.

(b) In the summer of 1983 petitioner filed a second EEOC charge alleging continuing discrimination. Although petitioner had by this time consulted with an attorney[7] and was admittedly aware of the International's existence and of the facts that later gave rise to the claim that the International had not responded to a request for assistance,[8] petitioner named only Local 20 as a respondent. Moreover, the charge contained no factual allegations from which it could be inferred that the International had been asked to remedy discriminatory conduct, or that the International had failed to do so, because of petitioner's sex or otherwise.

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[7] Although one of the district court's findings (which were copied almost verbatim from those submitted by petitioner) states that "Stache was not represented by an attorney at any time before March 1984 (when she filed the action below)," petitioner's own pre-trial correspondence with the EEOC and trial testimony shows that petitioner was in fact advised by an attorney during the charge filing process. Trial Exhibit 102 shows that petitioner stated in writing to the EEOC that she had had an attorney call that agency on her behalf regarding her charges in August of 1982. Moreover, petitioner testified at trial that she was again advised by an attorney prior to filing her fourth EEOC charge in 1983 (5 RT 44).

Although the ultimate standard of review is unchanged, the Court has frequently "criticized courts for their verbatim adoption of findings of fact prepared by the prevailing parties," noting "the potential for overreaching and exaggeration on the part of attorneys . . ." *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 572 (1985).

[8] The letter that petitioner claimed to have mailed to the International Union was dated July 11, 1982. Trial Exhibit 544.

In December of 1983, the EEOC held another fact-finding conference in response to the second EEOC charge. At the conference, which lasted approximately one hour, a second EEOC official met personally with petitioner and with the Local's business manager and obtained from the Local documents that petitioner claimed the Local had improperly withheld from her. During the conference, petitioner again did not allude to the International at all, and mentioned no facts referring to the way in which petitioner's complaints against the Local were handled, or suggesting that the International had engaged in *any* improper conduct.

(c) On January 4, 1984 plaintiff filed a third discrimination charge, this one with the California Department of Fair Employment and Housing, a cooperating EEOC agency. Although this charge added one of petitioner's employers as a respondent, the charge neither named the International nor set forth any of the facts upon which the International's liability was subsequently based.

(d) After consulting further with an attorney,[9] petitioner returned to the EEOC on February 22, 1984 and filed yet a fourth charge, naming the JAC as a respondent. This charge likewise omitted any reference, direct or indirect, to the International.

Thus, the International was unnamed in any of petitioner's four administrative charges, and neither the International nor the EEOC were apprised *in any way* of the allegation that the International had illegally handled complaints against the Local. As a result of this lack of notice, the International had no reason to, and did not, attempt to collect the evidence pertinent to the eventual charges against it, such as evidence pertaining to whether the International Union in fact

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[9] *See* note 7, *supra*.

received petitioner's 1982 letter.[10] In addition, because it was not included in the EEOC conferences, the International had no opportunity, as the Local did, to hear the views of an expert agency as to the governing legal requirements, or to take steps short of litigation to satisfy petitioner's concerns.[11]

In its decision, the Ninth Circuit stated that while EEOC charges are to be construed liberally, a Title VII action may not be brought where "a complainant neither names a defendant in her administrative charges, nor alleges facts implying that the defendant discriminated." (Pet. App. A-8.) That court concluded that "the specific, active acts of discrimination" by Local 20 that were set forth in the petitioner's EEOC charges did not encompass "the International's alleged inaction" in failing to utilize its grievance procedures on petitioner's behalf. (*Id.*) Accordingly, the Ninth Circuit reversed the district court's judgment insofar as it imposed liability on the International.

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[10] The district court's findings of fact and conclusions of law, repeating verbatim the proposed findings submitted by petitioner, recite that the International "suffered no prejudice" from not being named in any of the discrimination charges "because it knew of the first EEOC charge expressly naming its affiliated local before the first fact-finding conference." (App. C-16.) However, the International was ultimately held to be liable not for participating in Local 20's discrimination, but rather on the basis that *the International* violated Title VII by discriminating on the basis of sex in its handling of petitioner's complaints against the Local. Because the International was not informed of petitioner's contention that *the International* (as opposed to Local 20) had discriminated, it did not attempt to gather relevant evidence concerning *its own* activities.

[11] There is no basis whatever in the district court's findings or in the record for petitioner's statement that the International "elected to rely on its local affiliate" to attend the EEOC conference on its behalf. (Pet. 18.)

REASONS FOR DENYING THE WRIT

I. The Decision In This Case Is Consistent With Decisions By Other Circuits In Cases Where An Unnamed Party's Liability Is Based On Facts Different From Those Set Forth In The EEOC Charges.

(a) The petition claims that there are "conflicts among the circuits as to the proper analysis of when Title VII charges may be tried on the merits against parties not named in EEOC charges." (Pet. 13.) That claim rests entirely on petitioner's failure to distinguish between two analytically distinct categories of cases repeatedly recognized by the lower courts in deciding Title VII cases.

The first category involves cases where the "persons not named in the E.E.O.C. complaint . . . were involved in the facts giving rise to the E.E.O.C. claims," *Wrighten v. Metropolitan Hospitals*, 726 F.2d 1346, 1352 (9th Cir. 1984), *i.e.*, where the charges allege particular acts of discrimination but omit the names of some of the parties who engaged in that discriminatory conduct. The second category involves cases in which the liability of one or more defendants sued in the Title VII lawsuit who were unnamed in the EEOC charges is based on a separate set of facts from those contained in the charges.

Once the distinction between these two categories of cases is taken into account, it becomes clear that petitioner's claim that there is a conflict among the circuits on the primary issue decided in this case has no merit.

The present case fits squarely in the second category of unnamed party cases: the lawsuit against the International Union was based on a separate legal theory and a separate set of facts from those underlying the charges filed against the named entities. In particular, petitioner's claim against the International was based not on discrimination in the apprenticeship program but rather on the International's alleged discriminatory failure to respond to petitioner's complaints against the

Local. See pp. 3-5, *supra*. Under this theory, the International's liability would depend upon such facts as its relationship with the Local and the petitioner, the notice the International had regarding petitioner's complaints against the Local and the actions it took in response to that notice. As the Ninth Circuit pointed out (Pet. App. A-8), none of these facts were encompassed within the affirmative acts of discrimination referred to in the EEOC charges.

The Ninth Circuit's holding that a Title VII suit may not be brought in cases where an unnamed party's liability was based on facts different from those set forth in the EEOC charges, far from conflicting with the decision of any circuit court, is fully consistent with the decisions by other circuits. For example, in *Terrell v. United States Pipe & Foundry Co.*, 644 F.2d 1112 (5th Cir. 1981), *vacated on other grounds*, 456 U.S. 955 (1982), the plaintiffs sued several international unions that had not been named in EEOC charges for damages based on a discriminatory seniority system imposed under contracts negotiated by their affiliated locals. After citing its earlier decision in *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970), one of the principal cases relied on in the petition, the Fifth Circuit stated:

> Applying these precedents and principles favoring liberality to the facts now before us, we must nevertheless conclude that the Internationals were insufficiently implicated in the discrimination alleged in appellants' original charges to have reasonably triggered EEOC investigation of the Internationals. *These charges failed to allege specific conduct which clearly implicated the Internationals.* Quite reasonably the EEOC then omitted the Internationals in its investigative and conciliatory efforts.

Terrell v. United States Pipe & Foundry Co., *supra*, 644 F.2d at 1124 (emphasis added). *See also Jones v. Truck Drivers Local Union No. 299*, 748 F.2d 1083 (6th Cir. 1984) (union that had not been named in EEOC charges

could not be sued under Title VII for failing to remedy discrimination by named employer); *Le Beau v. Libbey-Owens Ford Co.*, 484 F.2d 798, 799 (7th Cir. 1973) (international union unnamed in EEOC charges could not be sued in case alleging that contract provisions negotiated exclusively by local were discriminatory); *cf. Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890, 906 (7th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982) ("parties sufficiently named *or alluded to in the factual statement* are to be joined.") (emphasis added).

In contrast, all of the decisions by other courts of appeals regarding unnamed parties [12] that the petition claims conflict with the Ninth Circuit's decision in this case involve the first category of cases, where the unnamed party *was* involved in the actions complained of in the EEOC charges. In *Glus v. G.C. Murphy Co.*, 562 F.2d 880 (3d Cir. 1977), the charge was based on a discriminatory collective bargaining agreement, and the International, although not expressly named in the charge, negotiated and signed the agreement. In *Eggleston v. Chicago Journeymen Plumbers'*, *supra*, 657 F.2d at 906, the charge indicated that there was discriminatory exclusion from the apprenticeship program, and the defendant joint apprenticeship committee, while not named in the charge expressly, administered the apprenticeship program. Similarly, the unnamed party cases from other circuits cited in the petition—*Romain v. Kurek*, 836 F.2d 241 (6th Cir. 1987), *Greenwood v. Ross*,

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[12] Petitioner also cites numerous cases that deal with the separate issue raised when a single defendant claims that some of the allegations in the Title VII lawsuit were not encompassed in the EEOC charges against it. *E.g., Sanchez v. Standard Brands*, *supra* (EEOC charges against the defendant specified sex discrimination and subsequent lawsuit stated that discrimination involved both sex and national origin); *Turner v. Orr*, 804 F.2d 1223 (11th Cir. 1986) (suit against single defendant could include discriminatory acts occuring after filing of EEOC charges).

778 F.2d 448 (8th Cir. 1985) and *Romero v. Union Pacific Railroad*, 615 F.2d 1303 (10th Cir. 1980)—all involved instances where the charges named a company, union or other entity as a respondent, and the lawsuit added as defendants the individual officials of that entity who engaged in the conduct complained of in the charges.[13]

(b) Whatever may be the case when a plaintiff seeks to bring a Title VII lawsuit against an unnamed party who was involved in the actions complained of in the EEOC charges, the Ninth Circuit is plainly correct in holding that the International could not be held liable in this case for activity that was not even vaguely alluded to in the EEOC charges against Local 20 and the JAC.[14] As this Court reiterated in *Occidental Life In-*

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[13] Like the other circuits, the Ninth Circuit has held that a party not named in the EEOC charges who *was* involved in the actions complained of in the charges may be subject to suit in a subsequent Title VII action. *Kaplan v. International Alliance of Theatrical and Stage Employees and Motion Picture Operators of United States and Canada*, 525 F.2d 1354 (9th Cir. 1975) (international union, although not named in charge, was the party that negotiated and signed the local's collective bargaining agreement challenged in the charge as discriminatory); *see also Chung v. Pomona Valley Community Hospital*, 667 F.2d 788, 790, 792 (9th Cir. 1982) (the charge complained of certain discriminatory promotions, and the unnamed parties were the ones who negotiated the promotions).

[14] Petitioner's contention that the Ninth Circuit erred in "refusing" to remand the case for consideration of the factors set forth in *Glus v. G.C. Murphy Co.*, *supra*, is incorrect for two reasons.

First, as set forth above, *Glus* and the other cases cited by petitioner concern the situation where the unnamed party was involved in the conduct set forth in the EEOC charges.

In addition, however, petitioner did not request the adoption of the so-called *Glus* test or suggest that a remand to the district court was appropriate until after the case had been argued and decided, raising the matter for the first time in her petition for rehearing in the court of appeals. Petitioner likewise did not request the use of the *Glus* test at any point in the district court, including in her proposed jury instructions. (CT 143; Ct 170.)

surance Co. v. EEOC, 432 U.S. 355, 359-60 (1977), Congress established in Title VII an "integrated, multistep enforcement procedure" in which notification to the parties charged and EEOC conciliation procedures are a central and key component.[15]

This lawsuit against the International Union proceeded upon a different theory and upon different facts from those of which the EEOC was given notice and which that Agency had an opportunity to consider. As a result, the International was denied "fair notice of the allegations against it" as well as the benefits of the conciliation process. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 79 (1984).

The petition for *certiorari* should be denied because the result reached by the Ninth Circuit in this case does not conflict with the decisions of other circuits and is fully consistent with the statutory purposes of the EEOC charge filing requirement. Thus, the petition raises no issue of law warranting review and resolution by the Court.

II. This Case Implicates No Difference Among The Circuits Concerning The "Test" For Determining The Scope Of EEOC Charges.

Quoting out of context general statements regarding the "scope of the EEOC investigation" in the Fifth Circuit's opinion in *Sanchez v. Standard Brands, Inc.*, *supra*, petitioner asserts that the Fifth Circuit's approach to determining the scope of EEOC charges is fundamentally

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[15] Congress amended Title VII in 1972 to add the requirement that notice be given to a charge party within 10 days. The purpose of this amendment was "giving notice to the party charged so that he would have the opportunity to gather and preserve the evidence to sustain himself when formal charges are filed and subsequent enforcement proceedings are instituted." 117 Cong. Rec. 31972 (remarks of Cong. Erlenhorn), quoted in *Occidental Life Insurance Co. v. EEOC*, *supra*, 432 U.S. at 371 n.30.

inconsistent with the Ninth Circuit's analysis of the EEOC charges in this case. In fact, however, there is no difference in the approach followed by the two circuits.

As a matter of inherent logic, inquiry into the words of an EEOC charge are necessary to determine what sort of investigation by the EEOC would be reasonable. Thus, the *Sanchez* court itself stated, "we think the crucial element in a[n EEOC] charge of discrimination is the set of *facts* alleged therein . . ." 431 F.2d at 464 n.6 (emphasis in original). Further, immediately after talking about the EEOC's "reasonably expected investigations," the *Sanchez* court returned to the statement of facts set forth in the charge itself, concluding that:

> [N]othing in the judicial complaint filed by Celia Sanchez is *beyond the scope of her charges filed with the EEOC.* Thus she is entitled to maintain her civil action on the basis of that complaint.

421 F.2d at 467 (emphasis added). Subsequent Fifth Circuit cases have likewise reiterated that the scope of an EEOC investigation is "quite reasonably" tied to the "specific conduct" alleged in the EEOC charges. *E.g., Terrell v. United States Pipe & Foundry Co., supra,* 644 F.2d at 1123-24.

Similarly, Ninth Circuit opinions discussing the appropriate scope of EEOC charges frequently refer to what a reasonable EEOC investigation would encompass. For example, *Brown v. Puget Sound Electrical Apprenticeship & Training Trust,* 732 F.2d 726 (9th Cir. 1984), which petitioner cites as the key Ninth Circuit case that "conflicts in principle with the *Sanchez* test because it focuses on the allegations in the EEOC charge rather than the *investigation* that can reasonably be expected to grow out of those allegations" (Pet. 20, emphasis in original), concludes by citing *Sanchez* and stating:

> " 'It is only logical to limit the permissible scope of the civil action to the scope of the EEOC investigation which can reasonably be expected to grow out

> of the charge of discrimination.'" *Serpe v. Four-Phase Systems, Inc.*, 718 F.2d 935, 937 (9th Cir. 1983), citing *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970).

732 F.2d at 730. Numerous other Ninth Circuit cases likewise refer to both the charges and the EEOC investigation, citing the *Sanchez* opinion approvingly. *E.g.*, *Stallcop v. Kaiser Foundation Hospitals*, 820 F.2d 1044, 1051 (9th Cir. 1987) (administrative investigation is "obviously" based on charge filed with the agency). Thus, both the Fifth and the Ninth Circuits have used the "reasonable investigation" language as a way of explaining *why* one focuses on the stated facts in determining the scope of the EEOC complaint.

Accordingly, the decisions of the Fifth and Ninth Circuits show common ground in recognizing that the scope of an EEOC investigation is not determined in a vacuum but is necessarily circumscribed by the statement of facts set forth in the underlying charge. There is thus presented no conflict in "tests" for ascertaining the scope of EEOC charges warranting review by the Court.[16]

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[16] Relying on *Hamm v. Members of Board of Regents*, 708 F.2d 647, 650 (11th Cir. 1983), petitioner suggests that the issue of whether a defendant has been properly named in EEOC charges is an issue of fact governed by the "clearly erroneous" test of Fed. R. Civ. P. 52(a). But petitioner seriously misstates the ruling in that case. Although the court of appeals did note that the question of whether two defendants were included in the EEOC charges was "not entirely free from doubt," its statement that the trial court's decision was not "clearly erroneous" concerned an entirely different matter, namely its dismissal of the charges against other defendants *on the merits* at the conclusion of plaintiff's case under Fed. R. Civ. P. 41(b). 708 F.2d at 650.

Although underlying factual questions may occasionally be raised, the ultimate determination of whether a defendant in a Title VII lawsuit has been properly named in EEOC charges, like other questions concerning whether a pleading adequately states a claim against a particular party, is necessarily a matter of law. *Compare Schiavone v. Fortune*, 477 U.S. 21, 25-28 (1986). Thus,

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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the "clearly erroneous" test for reviewing district courts' determinations of fact plainly does not govern the resolution of this ultimate legal issue. While some of the circuit courts have stated that the issue of whether parties were properly named should be "initially considered" by the district court, *Eggleston v. Chicago Journeymen Plumbers, supra*, 657 F.2d at 907 n.33; *Romero v. Union Pacific R.R. Co., supra*, 615 F.2d at 1312, no court has indicated that those rulings are then subject to review under the "clearly erroneous" standard.